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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RICHARD NORQUIST, Plaintiff and Respondent, v. MICHAEL SMITH, Defendant and Appellant.	G032557 (Super. Ct. No. 01CC14200) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Clay M. Smith, Judge. Affirmed.

Steven D. Schatz for Defendant and Appellant.

Stephen W. Johnson for Plaintiff and Respondent.

* * *

Shortly before trial, Michael Smith dismissed his complaint against Richard Norquist for defamation and intentional infliction of emotional distress. Norquist then sued Smith for malicious prosecution. Following a bench trial, the court entered judgment in Norquist's favor on the malicious prosecution claim. Smith appeals from that judgment. We conclude there was substantial evidence supporting the trial court's statement of decision, and therefore affirm.

STATEMENT OF FACTS

On August 11, 2000, Smith filed a civil action against Norquist for defamation and intentional infliction of emotional distress (the underlying case).[1] Smith dismissed the underlying case in July 2001, shortly before the trial was to begin.

On November 5, 2001, Norquist sued Smith for malicious prosecution. After a bench trial, the court issued a statement of decision concluding Norquist had established the elements of his claim for malicious prosecution, and judgment should be entered in Norquist's favor and against Smith.[2] No objections were filed to the statement of decision. The court entered judgment in favor of Norquist on May 13, 2003. Smith appealed.

DISCUSSION

A. STANDARD OF REVIEW

"Where the court issues a statement of decision, it need only recite ultimate facts supporting the judgment being entered. [Citation.] If the judgment is supported by

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[1] On our own motion, we augment the record on appeal with the following documents from the Orange County Superior Court file: complaint, case No. 01CC14200, filed November 5, 2001; and statement of decision, case No. 01CC14200, entered March 20, 2003. (Cal. Rules of Court, rule 12(a)(1)(A).) Smith's complaint for defamation and intentional infliction of emotional distress in the underlying case No. 00CC09648 was attached as exhibit 1 to the complaint in case No. 00CC14200.

[2] We express our appreciation to the trial court for the thoroughness of the statement of decision.

factual findings based on substantial evidence, the reviewing court affirms. [Citation.] Conflict in the evidence is of no consequence." (*People v. Orange County Charitable Services* (1999) 73 Cal.App.4th 1054, 1071.) "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

The elements of a claim for malicious prosecution are (1) commencement of a prior civil proceeding, (2) terminating in the malicious prosecution plaintiff's favor, (3) brought without probable cause, and (4) initiated with malice. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965-966.) The trial court concluded Norquist had established each of these elements. On appeal, Smith challenges the sufficiency of the evidence only with respect to the elements of favorable termination and probable cause.

B. FAVORABLE TERMINATION

Because the trial court's statement of decision is so detailed and thorough, we quote it in its entirety with respect to the issue of favorable termination of the underlying case: "The Underlying Case was voluntarily dismissed by [Smith] on July 25, 2001, five days prior to the scheduled trial date. The dismissal was without condition and not the product of any agreement or negotiation.

"The traditional rule is that a voluntary dismissal constitutes a favorable termination as an implicit concession that the case is without merit. The more modern rule, however, as [Smith] correctly points out, is as follows:

"'It is not enough, however, merely to show that the proceeding was dismissed. The reasons for the dismissal of the action must be examined to determine whether the termination reflected on the merits. A voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not constitute a favorable termination because it does not reflect on the substantive merits of the underlying claim.' *Robbins v. Blecher*, 52 Cal.App.4th 886, 893-894 (1997) (citations omitted).

"In this case, [Smith] has argued passionately that the decision to dismiss the case was based on economics and not on the merits of his claims. He contends that, based upon advice of counsel, he concluded that pursuing his claims to a potential judgment would be unlikely to result in a collectable judgment against [Norquist].

"The Court concludes that [Smith]'s contention is false and that in reality the decision to dismiss the Underlying Case does sufficiently reflect on the merits to constitute a favorable termination. The Court's finding is based on the following factors: (1) The dismissal was filed voluntarily less than a week before the trial date after [Smith] became aware of the evidence [Norquist] was prepared to present. (2) The Underlying Case was so utterly devoid of merits . . . that it seems unlikely that the case could have been asserted for any appropriate reason. (3) [Smith]'s level of animosity toward [Norquist] leads inescapably to the conclusion that [Smith] would not have dismissed the case based upon the perceived uncollectability of the potential judgment. On the contrary, it is clear that only an overwhelming probability of losing at trial would have motivated [Smith] to abandon the Underlying Case."

A voluntary dismissal usually results in a favorable termination. "'In most cases, a voluntary unilateral dismissal is considered a termination in favor of the defendant in the underlying action; the same is true of a dismissal for failure to prosecute. [Citations.] [¶] On the other hand, a resolution of the underlying litigation that leaves some doubt as to the defendant's innocence or liability is *not* a favorable termination, and

bars that party from bringing a malicious prosecution action against the underlying plaintiff. Thus, a dismissal resulting from negotiation, settlement or agreement is generally not deemed a favorable termination of the proceedings. [Citations.] The purpose of a settlement is to *avoid* a determination on the merits.' [Citation.]" (*Hurvitz v. St. Paul Fire & Marine Ins. Co.* (2003) 109 Cal.App.4th 918, 927.)

Where evidence conflicts as to the real reason for voluntary dismissal of the underlying case, a factual question arises whether or not the dismissal amounts to a favorable termination. (*Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1855; *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 583.) Smith agrees with this principle in his opening appellate brief, arguing, "it is a question of fact whether or not the voluntary dismissal should be construed as an admission of a lack of merit or should be attributed to some other cause which would prevent the dismissal from being a termination on the merits."

The trial court made detailed factual findings in its statement of decision that the voluntary dismissal of the underlying case was a favorable termination on the merits. These findings were supported by substantial evidence. Smith testified that although he believed the underlying case was strong, he dismissed it because he did not think he would ever be able to collect on a judgment against Norquist. The trial court found this testimony to be "false." The trier of fact is the exclusive judge of the credibility of witnesses. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 182; *In re Daniel G.* (2004) 120 Cal.App.4th 824, 830; *Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035, 1058.) The evidence of the animosity between Smith and Norquist permeated the entire proceeding. Smith did not like Norquist and never hid his dislike. Given the lack of merit of the underlying case (addressed below) and the extremely bad relationship between the two parties to the litigation, the trial court's finding regarding favorable termination has significant factual support.

Smith argues the trial court made its findings regarding favorable termination without considering any of the evidence he offered. Smith cites the court's statements in denying his motion for nonsuit. Obviously, the court denied the motion for nonsuit without hearing Smith's case. But the case proceeded, and Smith's evidence was admitted. The court's analysis for purposes of considering a motion for nonsuit was not necessarily the same as its analysis of all the evidence at the conclusion of the case. Smith failed to show the court did not consider the evidence he presented.

C. PROBABLE CAUSE

Again, we quote the statement of decision in full with regard to the issue of probable cause: "In the Underlying Case, [Smith] asserted two claims, defamation and intentional infliction of emotional distress. Both claims were completely devoid of probable cause.

"As to the defamation claim, [Smith] asserted that he was defamed by [Norquist]'s communication to hospital staff that [Smith] had been the subject of an expired restraining order and that he had a reputation for violence within the police department and the community. These statements were certainly true and [Smith] knew them to be true.

"First, an Emergency Protective Order, based upon [Smith]'s violent assault on [Norquist], was issued by the Orange County Superior Court on May 21, 1998 and expired on May 29, 1998. In addition, a Temporary Restraining Order was issued against [Smith] on December 18, 1998 and expired on January 4, 1999. Second, [Smith] had made at least one profane, ominous, and shocking threat against a member of the Costa Mesa Police Department. He had also been arrested by the Costa Mesa Police Department following the violent assault on [Norquist]. In short, it was utterly frivolous to claim that [Norquist]'s statements to hospital staff were defamatory. On the contrary, the statements were true, [Smith] knew they were true, and, under the circumstances, it

was responsible for [Norquist] to make the hospital staff aware of the potential threat that [Smith] represented.

"The claim for intentional infliction of emotion[al] distress is equally frivolous. The essence of this claim is that [Norquist]'s statements to the hospital staff and [Norquist]'s advice to the hospital that there was a 'do not resuscitate order' in effect for [Norquist]'s wife ([Smith]'s mother), constituted an intentional infliction of emotion[al] distress. First, the record does not support a contention that [Norquist] advised the hospital of the existence of a do not resuscitate order. Even if true, however, this claim is groundless.

"It is simply beyond question that [Norquist] and his gravely ill wife had a right to determine that they did not want to be contacted by [Smith] during the period of her hospitalization and to what extent medically heroic efforts would be used. These were reasonable, rational, personal, and private decisions between [Norquist] and his wife. To assert that these decisions constitute the type of outrageous, shocking conduct which is necessary to constitute the tort of intentional infliction of emotional distress is almost unimaginable.

"[Smith]'s defense that the Underlying Case was filed on the advi[c]e of counsel also fails. Based upon the record, [Smith] consulted only with attorney Robert Fisher prior to filing the Underlying Case and [Smith] did not make a full, honest and good faith disclosure of all pertinent facts to Mr. Fisher.

"In summary, the Court finds that the claims asserted in the Underlying Case were frivolous and utterly lacking in probable cause. Without question, these claims were filed to gain a tactical advantage in the litigation pending between these parties, or to harass and annoy [Norquist], or both."

Smith argues the trial court erred by "refusing to acknowledge that Smith had both subjective and objective probable cause to file the underlying case." Probable cause is judged by an objective, not a subjective, standard. "Whereas the malice element

is directly concerned with the *subjective* mental state of the defendant in instituting the prior action, the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. The resolution of that question of law calls for the application of an *objective* standard to the facts on which the defendant acted." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 878.)[3]

The trial court found Smith did not have probable cause to file the underlying case, as detailed above. There was more than sufficient evidence in the record to support the court's findings. As to alleged defamatory statements by Norquist that Smith was known for violence in the community and to the Costa Mesa Police Department, Smith had been arrested for assault with a deadly weapon and residential burglary in May 1998; left a telephone message for a Costa Mesa police officer in January 1999, stating, "I'm going to nail you to the fucking wall" and "I'm gonna' bury you"; and wrote a note to another Costa Mesa police officer, threatening to have him arrested for trespass and sue him for police harassment, and concluding "[d]on't ever make personal comment[s] to anyone in my family regarding my mother again[,] you arrogant prick." All of these were facts known to Smith at the time he filed his complaint for defamation.

As to alleged defamatory statements by Norquist to hospital personnel that there was a restraining order in effect prohibiting Smith from seeing his mother, Sharon

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[3] Smith cites *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 55, in support of his contention that probable cause is judged subjectively. In *Sheldon Appel Co. v. Albert & Oliker, supra,* 47 Cal.3d at page 880, the California Supreme Court specifically distinguished *Bertero v. National General Corp.*: "[W]hat was disputed [in that case] was not the defendant's subjective belief in the legal tenability of his claim, but rather the state of the defendant's knowledge of the facts on which his claim was based." (Fn. omitted.) Further, Smith's trial counsel agreed probable cause is judged by an objective, not a subjective standard.

Norquist, the hospital record reflected that Norquist actually told the hospital the restraining order had expired but he was attempting to have it reinstated; Smith admitted reading the record before providing it to his attorney.

As to Smith's alleged emotional distress due to the "do not resuscitate" order (DNR) for his mother, Norquist testified he never advised hospital personnel a DNR existed for Sharon Norquist and he never requested that the hospital withhold life support systems from her. The only evidence Smith offered of the existence of a DNR was his testimony that his former attorney was aware of its existence. Smith did not testify he was aware of the existence of a DNR for Sharon Norquist; even assuming a DNR existed, unless Smith was aware of it, he could not have been emotionally distressed by it.

Smith argues the advice of counsel provided a full defense to Norquist's malicious prosecution case. The advice of counsel defense applies when the plaintiff in the underlying case initiates that case pursuant to the advice of counsel after "the full disclosure of all relevant facts" and acts with probable cause and in good faith. (*Bertero v. National General Corp., supra,* 13 Cal.3d at p. 53.) The defense fails, however, when the plaintiff in the underlying case "acts in bad faith or withholds from counsel facts he knew or should have known would defeat a cause of action otherwise appearing from the information supplied." (*Id.* at pp. 53-54.) The testimony at trial was that Robert A. Fisher, the attorney representing Smith in connection with the Norquists' bankruptcy proceeding, told Smith he thought Smith had a "good case," and suggested Smith see another attorney to file an action before the statute of limitations ran. However, Fisher admitted Smith had not provided him with one of the key documents or given him all the facts of the underlying case. Fisher had not conducted an independent investigation of Smith's claims or the facts supporting them. (Smith testified he spoke with three other attorneys before filing his lawsuit, but the trial court found Smith's testimony was false, and therefore we do not consider his testimony on appeal.)

DISPOSITION

The judgment is affirmed. Respondent to recover his costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.